IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 486

RUBEIN V. JOHNSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RUBEIN V. JOHNSON,
For and in his own cause.

Apartment #3,
3300 St. Charles Avenue,
New Orleans, Louisiana.

SUBJECT INDEX.

TABLE OF CASES.

AUTHORITIES CITED.

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No. .....

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Petitioner,

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner and defendant, Rubein V. Johnson, a citizen of the United States and of the State of Louisiana, presents herewith application for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in Case No.

10,984 affirming a conviction before a jury in the District Court of the United States for the Eastern District of Louisiana.

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended and set forth on page 30, etc., of the Revised Rules of the Supreme Court of the United States, making it competent for this Court to review by certiorari, any case, civil or criminal, in a Circuit Court of Appeals when the application is made within thirty days after entry of judgment (denial of rehearing) as required by the rules of this Honorable Court.

STATUTES INVOLVED.

The Federal Statutes involved are:

Section 338, Title 18, U. S. C. A.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United

States, in any post box, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both."

Section 77Q, 1, (a) Title 15, U. S. C. A.

(a) "It shall be unlawful for any person in the sales of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails directly or indirectly—

(1) "To employ any device, scheme or artifice to defraud, or . . ."

STATEMENT OF THE CASE.

Your defendant, Rubein V. Johnson, was one of eight co-defendants joined in a conspiracy type indictment brought in the United States District Court for the Eastern District of Louisiana, in which he was charged with violating Section 388, Title 18, U. S. C. A. (Mail Fraud Statute) and Sec. 77 Q (a) (1), Title 15, U. S. C. A. (Securities and Exchange Act).

All of the defendants were found guilty on two counts each of the aforesaid Statutes.

Your defendant was sentenced to serve five years on Count No. 4 and two years on Count No. 5. The sentence on Count No. 5 to run consecutively with the five years imposed on Count No. 4; these counts being violations of the Mail Fraud Statute. He was further sentenced to a term of five years imposed on Count No. 1 and two years on Count No. 2 to run consecutively to Count No. 1, these being violations of the Securities and Exchange Act; the sentences under Counts 1 and 2 to run concurrently with the sentences imposed on Counts 4 and 5, thus making a total of seven years.

Petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit. A judgment affirming the conviction was rendered on July 10, 1946. Application was made for a rehearing which application was denied on August 12, 1946. Your defendant thereupon filed an application for a stay of mandate for a period of thirty days to enable your petitioner to apply for writs of certiorari to the Supreme Court of the United States for review of the said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit. This application was granted on August 16, 1946.

Your petitioner was found guilty by a jury on each of the aforesaid counts on the elements of a conspiracy, not having in his own instance violated the prohibited overt act of any of the substantive offenses charged but

having been convicted as a co-conspirator with other defendants against whom an overt act under the mentioned statutes was charged.

SPECIFICATIONS OF ERRORS URGED.

The United States Circuit Court of Appeals erred in failing to hold:

(1) That the District Court for the Eastern District of Louisiana erred in refusing to consider a bill of exceptions to the validity of Counts 1 and 2 of the indictment, and in failing to maintain the various motions and exceptions taken in connection with Counts 1 and 2 of the indictment, as well as the motion for a directed verdict on these counts, for the reason that these Counts 1 and 2 were alleged violations of Sec. 77 A (a) (1) Title 15, U. S. C. A. (Securities and Exchange Act) whereas the evidence offered by the government showed conclusively that the securities were "cash deeds" covering the sale in fee simple of real estate and were not securities within the text or meaning of the act and that the admission of the evidence thereon over proper and timely objection acted to prejudice the minds of the jury on matters not coming properly under the alleged violation of that particular act.

(2) That the trial Court committed substantial and prejudicial error in refusing to charge the jury that "the defendant did not have to take the stand and that the failure of the defendant to take the stand was not to be considered or discussed by the jury as an element of his guilt or innocence" and

further that the statement of the Court that it was elementary that he did not have to so instruct the jury was by inference an instruction to the jury that it was the duty of the jury to consider the failure of the defendant to take the stand as an element of guilt and in thus inflaming the minds of the jury to your petitioner's prejudice.

(3) This admitted error on the part of the trial judge after the jury had been allowed to retire and deliberate for several hours was not cured by the subsequent correction of the charge by the trial Court after the jury, by its request for additional instruction, had indicated to the trial judge that it had already found some of the defendants guilty.

(4) That the trial Court committed substantial and prejudicial error in its charge to the jury on the question of reasonable doubt and upon its charge of assumption of innocence.

(5) That the trial Court should have granted this defendant's MOTION FOR A DIRECTED VERDICT which motion was made at the opening of the trial for the reason that the defendant had been denied a speedy trial granted by the Sixth Amendment to the Constitution of the United States and in support of this contention your petitioner has requested that the record be supplemented to show those factual and legal elements which the present record has omitted and which motions he asks this Court to consider and which are reflected by the certified extracts attached to this petition and which of themselves present the diligent effort of the defendant to present to the trial Court his application for a speedy trial.

(6) The evidence does not show or establish a general conspiracy and scheme, but, on the contrary is conclusive of separate and distinct schemes.

The United States Circuit Court of Appeals for the Fifth Circuit did not consider the point raised by this petitioner's "SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE".

TRANSCRIPT BY REFERENCE AND ADOPTION WITH EXHIBITS ANNEXED.

Petitioner's appeal to the Circuit Court of Appeals was in *forma pauperis* and the record was paid for by petitioner's co-defendants. Your petitioner is informed that writs of certiorari to this Honorable Court have also been filed by a number of co-defendants and he therefore respectfully requests that the record which is being furnished to this Court by the co-defendants will be made available to him, and he therefore adopts the record as furnished by the co-defendants as the record in his cause with the request that certain certified copies of records which were before the Circuit Court of Appeals for the Fifth Circuit in typewritten form be attached to this petition so that they may be physically before this Honorable Court and may be considered in connection with this application. That the motions referred to and which were certified by the Clerk of the Crcuit Court of Appeals for the Fifth Circuit are the following to-wit:

1. MOTION FOR SUPPLEMENTAL RECORD.

2. EXTRAORDINARY MOTION FOR ISSUANCE OF WRIT OF MANDAMUS.

3. SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE.

With these motions before the Court it will be in a position to properly consider this appeal at it was presented to the Circuit Court of Appeals.

BRIEF.

Your petitioner files herewith and makes part of his application for writs a brief in support of the specifications of errors herein urged.

WHEREFORE, petitioner, Rubein V. Johnson, respectfully prays that a writ of certiorari may issue to the Honorable the United States Court of Appeals for the Fifth Circuit to the end that his cause may be reviewed and determined by this Court and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may thereafter in due course be reversed and set aside and that judgment may be rendered herein setting aside the conviction and the sentence pronounced in connection therewith and discharging your petitioner.

Petitioner prays for all further and necessary orders and for such relief as the nature of his cause in this case may justify.

RUBEIN V. JOHNSON,
Petitioner.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND ARGUMENT ON THE SPECIFICATIONS OF ERRORS URGED.

1.

It is respectfully submitted that the trial Court erred in refusing to consider the bill of exceptions to the validity of Counts 1 and 2 of the indictment. These counts which were under Sec. 77Q (a) (1), Title 15, U. S. C. A. (Securities & Exchange Act) covered transactions in which the "securities" were actually cash deeds conveying a title in fee simple of real estate located in Louisiana. These conveyances of title used are in effect "deeds poll" and as such are complete in their legal substance under the law of the State of Louisiana sufficient to convey title and they contain incorporated within their four corners the entire contract between the parties. They show all liens or encumbrances on the said property, including mineral leases and/or royalty sales previously made. They conveyed to the purchaser a good and merchantable title and they contained no qualifying phrases or no further obligation upon the part of the vendors. The deeds themselves completed the transaction as between the parties and there can be no contention that there was any obligation, either express or implied, that was assumed by the vendors. They represented to the purchaser that he was buying certain acreage of Louisiana land and the deed or title as given actually conveyed to the purchaser the exact property which he had contracted to buy. There were no unrelated contracts in which the vendors or any other party

obligated themselves to do anything. The indictment does not allege nor does the government contend that there were any agreement, either written or verbal, that the property would be re-purchased. The transaction was exactly the same as the thousands of other real estate transfers that take place every day in these United States and the interest that was conveyed in the property was a full and complete title to the land, itself, and was not a sale of a fractional interest in the property conveyed. Under these circumstances it is respectfully contended that the sale was not one of "securities" so as to bring the transaction under the Securities and Exchange Act.

It is respectfully contended that the trial Court was in error in allowing the government to introduce any evidence in connection with these deeds and the trial Court was in error in failing to dismiss Counts 1 and 2, because by instructing the jury that they had a right to consider evidence in connection with the deeds as a violation of the Securities Act, the Court impregnated the minds of the jury with a declaration that to have dealt in the "securities" was a violation of the Securities Act. It is respectfully submitted to this Court that when the trial judge instructed the jury to consider the guilt or innocence of your appellant on Counts 1 and 2 the effect must of necessity been cumulative in its prejudicial effect on the jury. The Circuit Court of Appeals has passed over the question of the legal validity of Counts 1 and 2 in stating that since the sentences imposed on Counts 1 and 2 are to run concurrently with the two Mail Fraud Counts, that if there has been a

valid conviction on the two Mail Fraud Counts "the judgment must be affirmed, while if they are not it must be reversed". The entire indictment as it went to the jury contained two counts for alleged violations of the Securities Act and two counts for the alleged violation of the Mail Fraud Statute. In other words ONE HALF OF THE INDICTMENT AS IT WENT TO THE JURY WITH THESE ILLEGAL COUNTS, AND THE ILLEGAL EVIDENCE IN RELATION THERETO, WAS DECIDED BY THAT JURY WITH ONE HALF OF THE COUNTS OF THE INDICTMENT INVALID. The material and substantial damage done to the cause of your petitioner by said invalid and illegal counts and the inadmissible evidence thereto could only serve to the prejudice of your petitioner. Certainly it must be said that the inadmissible evidence offered by the government over the objection of your petitioner in relation to these two counts must have influenced the verdict of the jury on the whole of the indictment and especially is this true if each of the counts were interwoven with each of the other counts and with the charge of a general conspiracy.

If the elements of conspiracy run continuously and unbroken to join this petitioner to the other alleged coconspirators, then, by showing that other alleged coconspirators joined in the sale of cash deeds and if there is no other evidence except the joint pattern and design of all of the alleged co-conspirators to sell this real estate and if, as this petitioner complains, there is no overt act on his part of using the mails to defraud then it becomes very important that this Court should decide

whether or not the "cash deeds" are in fact "securities" within the meaning of the Securities & Exchange Act. Unless there has been a violation of the Securities & Exchange Act, there is no element of a conspiracy either charged or proven against this defendant which would connect him with Counts 4 and 5 (Mail Fraud) and the trial Court should therefore have granted his Motion For A Directed Verdict at the end of the trial. The only possible theory upon which this petitioner could have been convicted under Counts 4 and 5 (Mail Fraud) would have been because he was engaged in an unlawful conspiracy to violate the Securities Act. If the "cash deeds" were not securities within the meaning of the Securities & Exchange Act, then the entire conviction should fall as to this defendant.

2.

The appellant's cause in relation to this question should be considered in a different light than those defendants who were represented by learned counsel. It is contended that it was the duty of that trial Court to protest the essential rights of an accused—and in the absence of counsel in his behalf—there should not have been placed upon an unversed layman the burden of a decision on a technical question of law upon which the various attorneys were split, and especialy where subsequent events proved that the Court itself was in error in its denial of Mr. Coleman's (counsel for Silverman) motion for the special charge in this matter. The trial Court, by its expression that the refusal of request of Mr. Coleman was "elementary" had the effect of be-

littling Mr. Coleman before the jury and thus involuntarily and unwittingly caused your appellant to fail to take advantage of a bill of exceptions on this point. Had your appellant requested a bill of exceptions on this point, in view of the trial Court's criticism of the request, it would have brought your appellant into the same sphere of unwarranted criticism as was Mr. Coleman's client, with the same effect in the jury's mind. Naturally this appellant had no desire to incur the animosity or enmity of the Court by making a request for a bill of exceptions in the face of that open criticism. IT SHOULD BE BORNE IN MIND THAT THE REFUSAL OF THE COURT TO GRANT THE REQUEST OF MR. COLEMAN WAS AN IMPLIED INSTRUCTION THAT IT WAS NOT ONLY THE JURY'S PREROGATIVE TO CONSIDER AND DISCUSS THE APPELLANT'S FAILURE TO TAKE THE STAND BUT THAT FURTHER IT WAS THE JURY'S DUTY TO CONSIDER THE FAILURE OF THE DEFENDANT TO TAKE THE STAND AS AN EVIDENCE OF HIS GUILT. It is therefore respectfully submitted that the trial Court not only failed to protect the essential rights of your appellant but that further, through its criticism, it invaded the constitutional right granted to your appellant to refrain from taking the witness stand.

3.

The United States Circuit Court of Appeals for the Fifth Circuit has held that although the trial Judge committed reversible error in failing to instruct the jury "that it was not to consider as an element of innocence

or guilt the failure of any defendant to take the stand and that this failure of a defendant to take the stand was not to be a subject of discussion among the jury", it has concluded that this error was cured by the subsequent correction of it by its charge. It is respectfully submitted to this Court that if the defendant is entitled to charge at all, then by its very nature he was entitled to it before the jury began any of its deliberations. In the instant case the jury had been deliberating approximately six hours and then returned to the Court for the purpose of requesting further instruction. The instruction that they requested showed that they had already come to a conclusion regarding the guilt of some of the defendants. This being so, it is submitted that the effect of the correction was entirely lost. In *Bruno v. United States*, 308 U. S. 37, this Court has decided that it was reversible erorr for the Court to fail to give such an instruction. If this decision can be ignored by first allowing the jury to make up its mind as to the guilt of a defendant and in then allowing the trial Court to give the instruction, the will of Congress will have been circumvented.

4.

The trial Court, in instructing the jury on the question of reasonable doubt, stated that "a reasonable doubt is one for which a reason may be given" and in connection with the charge of the presumption of innocence it said:

> "But as forceful as that rule is in the protection of one who stands charged with crime, it must not

be forgotten that it is not intended, nor has it ever been intended, as extending aid to one who is in fact guilty so that he or she may escape just punishment. The rule is but a human provision of law, intended to prevent so far as human agencies can the conviction of an innocent defendant, but nothing more."

The latter instruction is the identical word for word language condemned by the same Circuit Court of Appeals for the Fifth Circuit in the case of *Gomila v. United States*, 146 Fed. (2d) 372. The writer adopts the language of the Circuit Court of Appeals in that case as an argument against this instruction. With reference to the charge on reasonable doubt, it is submitted that mere reading of the instruction is sufficient to show its incorrectness.

The Circuit Court of Appeals with reference to these instructions stated that the trial Court had corrected the charges. A close and careful re-reading of the charges given by the Court has failed to disclose where the trial Court did correct the charge. It is respectfully submitted that it is not sufficient that the Court should have given other instructions which correctly stated the law. Even though the Court may have in a dozen instances given the correct charge, still if he has allowed himself to give one erroneous charge, then that erroneous charge can only be cured by a specific instruction of the Court to disregard what it has previously said and then to properly enunciate the legal principle. Clearly in this case the trial Court did not instruct the jury to disregard what

it had said regarding a reasonable doubt and the presumption of innocence.

5.

The trial Court should have granted this petitioner's Motion For A Directed Verdict (at the opening of the case) because he had been denied the right for a speedy trial guaranteed by the Sixth Amendment to the Constitution. In support of this contention he has asked that the record be supplemented in order to reflect what actually transpired previous to the trial. The record, as it now stands, shows only a letter forwarded to the United States Attorney (R. 201 and 202) which constitutes a first demand for a speedy trial. The government admits the receipt of the letter (R. 190) where it is stated by the United States Attorney, the following to-wit: "On December 2, 1942 he wrote my office * * *". Despite this request for an early trial there elapsed a period of FOURTEEN MONTHS AND TWENTY-SIX DAYS before the trial was begun. Therefore the failure of the government to bring this matter to trial within a reasonable time constituted a denial by the government of a speedy trial as guaranteed by the Sixth Amendment to the Constitution and shows an invasion of that constitutional guarantee. This petitioner's second request for a speedy trial was filed by him in a so-called "Writ of Mandamus" which in substance was nothing more or less than a "Motion For A Speedy Trial". Although such Motion for a Speedy Trial was forwarded by this petitioner while he was incarcerated in the United States Penitentiary at Atlanta, Georgia and was received by

the Clerk of the United States District Court for the Eastern District of Louisiana, it was never filed as an official part of the record of the case, nor is this motion reflected in the record. It is marked Exhibit J-G of the Exhibits filed with this petition and is dated March 16, 1943, ELEVEN MONTHS AND TWELVE DAYS before the trial was begun. Again your petitioner's constitutional guarantee of a speedy trial was abridged. IT WAS A SECOND DEMAND FOR A SPEEDY TRIAL AND LIKE THE FIRST WAS ALSO IGNORED BY THE GOVERNMENT.

Petitioner respectfully does request that this Honorable Court examine in full the two exhibits annexed as a supplement to the record and listed in this petition as (1) MOTION FOR SUPPLEMENTAL RECORD, and, (2) EXTRA-ORDINARY MOTION FOR ISSUANCE OF WRIT OF MANDAMUS (with all exhibits attached thereto to such aforesaid exhibits) and upon examination of the aforesaid two motions it will be shown that this petitioner did everything in his power to get the record supplemented to reflect his cause in its true light because such record as it now stands does not show his Motion For Speedy Trial hereinabove referred to, nor does it show his Motion For Directed Verdict (at the opening of the trial referred to by the record on page 187) where is established the fact that this Motion For A Directed Verdict was submitted to the Court. Such Motion For A Directed Verdict in relation thereto is reflected by Paragraph 3 of the exhibit annexed and brought up to this Court in supplement to the record by

being there attached as Exhibit J-5 on the Motion For Supplemental Record. The full text of the aforesaid exhibits; MOTION FOR SUPPLEMENTAL RECORD and EXTRA-ORDINARY MOTION FOR ISSUANCE OF WRIT OF MANDAMUS (together with 11 exhibits attached thereto) will upon examination establish the fact that the trial Court was not only determined to deny justice to this petitioner but was also determined to prevent the fullness of factual and legal elements there involved from appearing in the record for proper review before the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals for the Fifth Circuit apparently did not consider these two exhibits which were before them at the time of their hearing for their decision is and was contrary to all principles of law as laid down by the several courts in relation to this valuable guarantee of the Sixth Amendment, inasmuch as the factual and legal elements here involved establish the fact that this petitioner twice requested and demanded a speedy trial and was twice ignored by the Government. As a result of requesting such speedy trial in two demands he did not acquiesce in the matter and therefore his case stands within the following principles of law as cited by the cases of:

Pietch v. United States, C. C. A. Okla., 1940, 110 F. (2d) 817, 129 A. L. R. 563, certiorari denied, 60 S. Ct. 1100, 310 U. S. 648, 84 L. Ed. 1414 where at page 819, 110 F. (2d) is stated:

> "A person charged with a crime cannot assert with success that his right to a speedy trial guaran-

teed by the Sixth Amendment to the Constitution has been invaded unless he asked for a trial. In the absence of an affirmative request or demand for trial made to the Court it must be presumed that appellant acquiesced in the delay and therefore cannot complain."

Ex Parte Pickerill, D. C. Tex., 1942, 44 F. Supp., 741, at page 742 states:

"The Sixth Amendment to the Constitution provides that, 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. The usual method for the enjoyment of this protection afforded by this provision is to ask for trial'."

Continuing is stated:

". . . it has been held that one already serving a term may, nevertheless, demand a trial upon another indictment which pends against him, because of this valuable guarantee. United States v. Cox, 5 Cir., 47 Fed. 2d, 988; McCarty v. United States District Court, 8 Cir., 19 F. (2d) 462; United States ex rel., Whitaker v. Hemming, 9 Cir., 15 F. (2d) 760; Beavers v. Haubert, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950.

"The idea of the provision against an unreasonable delay in trial is not solely a release from imprisonment, in the event of acquittal, but also a release from the harrassment of criminal prosecution, and the anxiety attending the same . . ."

Continuing is stated:

". . . the amendment is all embracing, a prisoner, a convict, one on bond, or, any and every

person who is charged with an offense has a legal right to this speedy settlement of the charge that is asserted against him."

The principle of law as stated by the case of *Beavers v. Haubert*, 198 U. S. 77 states at page 86 the following:

> "Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. . . . It must be remembered that the right is a constitutional one, and if it has any application to the order of trials of diferent indictments it must relate to the time of trial, not to the place of trial."

United States v. Cox, (5 C. C. A.) 47 F. (2d) 988 at page 989 states the following principle of law:

> "The right guaranteed to a defendant to have a speedy trial is not lost to him or in any substantial way abridged because of his being confined in the penitentiary. Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879; Frankel v. Woodrough, (C. C. A. 7) F. (2d) 796; McCarty v. U. S., (C. C. A.) 19 F. (2d) 462.
>
> "Whatever the form the relief should take, whether through the issuance by the Court of indictment of a Writ of Habeas Corpus Ad Prosequendum under Section 753, R. S. 28 U. S. C. A. Sec. 453, it is plain as that no dry or technical form of procedure should stand in the way of its granting, which can be easily afforded him through some available form of relief."

In the light of the foregoing authorities and with the exhibits which are attached to this petition there is es-

tablished factual evidence to show that this petitioner complied with every legal requisite in this connection. He had twice asked for a speedy trial and he was twice ignored by the government and it cannot be said that he acquiesced in the matter for when the case finally did come to trial he filed a written Motion For A Directed Verdict of acquittal (See paragraph 3 of Exhibit J-5). Not only did the trial Court fail to direct the verdict as requested but the Circuit Court of Appeals did not even pass upon the issue presented by the reiterated requests for a speedy trial and for the Motion For A Directed Verdict. Unless this Court passes upon the issue presented, this defendant submits to the Court that he has been deprived of his liberty only because of the fact that the Court have seen fit to ignore and brush aside your petitioner's guarantee under the Constitution. He has suffered because of official inaptitude and unless this Court in its supervisory power examines into this matter by reviewing the entire situation as shown by the attached exhibits then your petitioner has been deprived of his liberty without the due processes of law which are guaranteed to him as a constitutional right.

6.

The defendant in this matter was charged in a general conspiracy type indictment in which it is alleged that he, together with other alleged co-conspirators entered into a general conspiracy or scheme to violate the Securities and Exchange Act and that while so violating

the Securities and Exchange Act and in consort with the co-conspirators that one of the co-conspirators used the United States Mails for the purpose of carrying out the general conspiracy. The proof adduced by the government, however, showed a series of unrelated and separate actions wherein the defendant herein, acting alone or with one or more of the alleged co-conspirators did enter into separate and distinct transactions. Only a thorough and conscientious reading of the record will show that there was no general scheme or pattern and that each of the defendants made sales, sometimes alone and sometimes in collaboration with others.

It is respectfully submitted that this case comes entirely within the decision of this Court in the rule laid down in the very recent case, *Kotteakos v. United States*, 90 L. Ed. 1178, and is not controlled by *Burger v. United States*, 295 U. S. 78, as held by the Circuit Court of Appeals.

7.

This petitioner filed in the United States Circuit Court of Appeals for the Fifth Circuit, before the time of hearing, a motion entitled "SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE". This motion is now before this Honorable Court and adduced on a certificate and certification from the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit as an exhibit and it is one of the attached exhibits to this petition. Your appellant feels that the motion is full and complete in itself and that it will ob-

viate the necessity of arguing the point before this Court. In it is raised the question of the Constitutionality of the Securities & Exchange Act in so far as it allows a quasi-judicial inquiry by the Commission and contains language that results in a compulsion upon the part of one dealing in securities to incriminate himself or to incriminate those engaged with him by forcing them to testify as to the nature of their business and then allows the use of the information secured under compulsion to be used as the basis for the bringing of an indictment. In so far as the Act seeks by compulsion to secure the information, then to that degree the act is unconstitutional. In such a method an inquiry was had from Frank I. Kiefer, who was one of the co-defendants charged, but who was not brought to trial.

Your petitioner therefore requests this Honorable Court to examine all of the legal elements involved and which have been raised by the filing of this "SUPPLEMENTAL MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE" and to consider the brief and argument contained therein, which, for purpose of brevity is adopted in this brief by reference. The Motion For New Trial On Newly Discovered Evidence was not passed upon by the Circuit Court of Appeals for the Fifth Circuit and your petitioner contends that he has a right to be heard on this question inasmuch as it contains infringements of certain constitutional rights as outlined therein.

CONCLUSION.

It is respectfully submitted that the errors committed by the United States Circuit Court of Appeals for the Fifth Circuit, as well as their failure to pass upon the material motions for a speedy trial and for a new trial on the grounds of newly discovered evidence are substantial errors of law and that this Court, in its supervisory power, should review all of the questions previously presented to the Circuit Court of Appeals and to that end it should issue a writ of certiorari as prayed for herein and that after a hearing that it should reverse the Circuit Court of Appeals and discharge your petitioner.

Respectfully submitted,

RUBEIN V. JOHNSON.

INDEX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 486

RUBEIN V. JOHNSON,

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vs.

UNITED STATES OF AMERICA,

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ON APPLICATION FOR PETITION ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF

Preliminary Comments

In considering some of the contentions made by the Government, it becomes necessary to comment on its method of erroneous statements of fact which tend to create suspicion of wrongdoing where none actually does exist, and further, to pass lightly upon important issues as if they did not exist.

For instance, on page 16 of the Government's brief, it is stated that Petitioner sold some land in Texas to Miss Lorena Duling, prior to 1941. The record shows under

direct examination and also under cross-examination, that this is not true as she was sold a partnership interest directly into an oil well that petitioner was drilling (R. 892, 945).

It is important that this fact be established in its true light as the petitioner will establish from the record that his acts in this matter—and other matters of selling or attempting the sale of oil-royalties to a number of the investor-witnesses could not come within the breadth and scope of the general Pattern Of the alleged scheme as charged by the Government but on the other hand that the transactions were in themselves evidence of a separate scheme to consummate acts not within the scope of the one general conspiracy charged by the indictment.

It is also noteworthy to take cognizance of the fact that the government states in it's brief on page 44 that this petitioner's arraignment was delayed until May 26, 1943, due to his efforts to negotiate favorable sentence in the event he would plead guilty (R. 190-192, 201-202). The Government certainly cannot rely upon their contention in this respect by their claim that Mr. Edward R. Schowalter, Attorney at Law, represented this petitioner in an attempt to enter a plea of guilty as stated by the United States Attorney (R. 190-192) for the true facts in relation to this matter was set forth and corrected in open court by this petitioner (R. 204, 205), where there was conclusively shown to the trial court that Mr. Schowalter did not legally represent this petitioner, and further that this petitioner never did engage this attorney to so represent him. The Courts have consistently held that one is entitled to representation of counsel of his own choice and in this instance this attorney had been engaged to represent him by a third party without the petitioner's knowledge and consent. Further, the Government cannot rely upon the statement that delay in the trial of the case was invited by the letter set forth

in the record (R. 201-202), inasmuch as such letter there states in its full context that it was the desire of this petitioner to go to trial at an early date in any event to relieve him of mental strain and anxiety.

In this reply brief this petitioner will deal only with the following two matters because of the foregoing misstatements of fact by the Government in their brief and prefers to leave all other matters and questions raised by the original brief in status quo for the interpretation of this Honorable Court in the light presented.

1

The Evidence Does Not Show or Establish a General Conspiracy and Scheme, But, on the Contrary is Conclusive of Separate and Distinct Schemes.

As an illustration of this petitioner's alleged participation in the so-called general conspiracy, the Government has seen fit to describe such alleged participation on Page 16 of their brief stating: "Prior to 1941, Rubein Johnson had sold some land in Texas to Miss Lorena Duling. . . ." As previously pointed out such was not an interest in land but was a partnership interest vested directly in an oil well in Texas (R. 892, 945, 952).

It is conclusively established from the record through this witness that under the circumstances of fact there related that there was not a one general scheme; for this petitioner with one Overgaard (named in the indictment as a confederate but not indicted because of death) advised the witness that her deeds should be examined and further that such were not correct (R. 946, 947). Such action here on the part of this petitioner (with Overgaard) could not be construed as a furtherance of the alleged scheme but on the other hand would have the force and effect of arousing suspicion in relation to her transactions, and further could

not come within the sphere and scope of lulling, loading and reloading as the Government contends. Further, the record established that Safir (co-defendant) advised the witness-investor that he had seen Diaz and Silverman talking together in the Heidelburg Hotel, Jackson, Mississippi (R. 925-26-36). Does this look like a One General Conspiracy in the true light of the fact that Diaz had stated to the witness-investor that he did not know Silverman (R. 926)? If there had been Agreement—Knowledge—Concert of Action as between the defendants or confederates, Overgaard, Johnson, Diaz, Silverman and Safir—Would These Things Have Happened in the True Light of Common Sense and the Elements of Conspiracy? No. Had such been true that a conspiracy existed between these defendants in one common enterprise, this petitioner with Overgaard would not have stirred up discontent by the request that her deeds be examined and that they were not correct nor would Safir have aroused her suspicions (R. 925-926) in light of the fact that Diaz had emphatically stated to her that he did not know Silverman (R. 926). No—If There Had Been One Common Enterprise—Those Things Would Not Have Happened. Here the Bald Facts Refutes the Contention of the Government in Its Allegation of a One General Scheme and Conspiracy and Further Destroys the Appellation Placed Thereon by the Circuit Court of Appeals in Their Statement of a "Wolf Gang Pack That Moved in for the Kill." Further, there are other acts of this petitioner which are not within the scope of the pattern and design of the alleged scheme such as the investor-witness, Miss Marguerite Monjure (Mrs. Matthews) where from her own admission this petitioner offered her oil-royalties for sale, on his every contact with her (R. 987). She further admitted she would not pay any attention to petitioner's offer on oil-royalties because she was so sold on Plaquemine Parish Land (R. 987), and further stated that

because some one wanted to buy her land that she had to have five acres more (R. 987) and further that she requested such land from the petitioner (R. 987). In this instance it was strictly giving the investor what she wanted when she would not buy what the petitioner offered for sale—namely, oil-royalties. To hold that such acts of this petitioner here were anything but acting in his own individual capacity would invite stretching the imagination. This same fact was further brought to light in the evidence presented by Dr. Prentiss Smith (R. 525, 526, 527, 528, 529), where oil-royalties were offered to the investor-witness—where no mention or association was had with a land deal—after this investor-witness had been sold such land. Had There Been a Common Enterprise and a Single Conspiracy as the Government Charges and Contends, Certainly the Petitioner Here Would Not Have Lost an Opportunity to Further That Scheme by Boosting This Land in Such Way as to Invite or Anticipate Further Sales in Which He Would Participate in That Common Enterprise. The Thread of Mutual Assistance in the Elements of Agreement, Knowledge, Concert of Action, Here on a Common Enterprise Are Certainly Lacking in Proof by the Facts of Evidence to Prove a One General Scheme. However, From the Foregoing Instances Are Shown Separate Acts, Not in Unison and Accord With the Alleged Pattern of Loading, Reloading, Lulling to Conform to a General Common Enterprise But in Actuality Those Facts Establish Acts That Are Contrary to Such Where One Alleged Co-conspirator Acts to Thwart the Efforts of the Other Alleged Co-conspirator. If such can in effect be conspiracy, then, this petitioner contends that such can only be done as the result of vivid imagination—and not from the legal substance and elements that go to constitute conspiracy.

2

That the Trial Court Should Have Granted This Defendant's Motion for Directed Verdict Which Motion Was Made at the Opening of the Trial for the Reason that the Defendant Had Been Denied a Speedy Trial Granted by the Sixth Amendment to the Constitution of the United States.

The Government contends that delay in the trial of this case was done in an effort to allow negotiations for a plea of guilty to be entered by Petitioner. Such has been disproved by previous reference to the record in this reply brief on Page 2. The Government further contends on Page 44 of their brief that this Petitioner's defense was not in any way impeded by delay in trial in that witnesses, if any, were no longer available. What the Government evades though is the fact that in the invasion and abridgment of this constitutional right that other constitutional rights are automatically invaded, and further that such invasion implies prejudice. Here, the delay in trial caused Mental Strain and Anxiety—as set out in the text and context of his letter (R. 201-202). There the letter requesting an early trial calls attention to this mental strain and anxiety directly to the Government—it makes them aware of the existence of such in the event of unwarranted delay. Extending as it did over a period of time—such did in effect constitute "cruel and unusual punishment" contrary to the 8th Amendment to the Constitution. Such was caused and done through the invasion of that right of the Sixth Amendment to a speedy trial in the first place. Further, the Government knew this Petitioner was serving a sentence in the United States Penitentiary, Atlanta, Georgia, and that he could be prevented from making application for parole with a pending indictment against him as the Govern-

ment well knows that it is not the policy of the United States Board of Parole to consider applications for parole with pending indictments upon which there has been no bond made. Petitioner does not claim that parole is a vested right as it is only a privilege extended by the Government and by the Congress but he does claim that any infringement of his right to make application for parole is the invasion of a vested right. He is extended the right to make application through the parole laws, rules and regulation, etc., which have the force and effect of law and become in effect part of his sentence as entered, and such right of application for parole is a vested right that was here infringed upon by this unwarranted delay in trial on this case to deny him "due process of law" as consistent with that right of the 5th Amendment to the Constitution. Thus, it is contended that the Government cannot rely only upon their contention that delay did not impede his defense by the lack of defendant's claim of the availability of witnesses. That question here does not stand alone—but as previously pointed out there are other questions at issue and consideration of those questions must be taken in the light of the overall picture that is here presented where undeniable damage has been done to the just and true cause of this petitioner. With this letter (R. 201, 202), and his Motion for Speedy Trial (being the so-called writ of mandamus elaborated on in the original brief), such, did constitute two attempts in good faith on the part of this petitioner to have this case come to trial. He did all in his power to get that done to the best of his knowledge and effort but it availed him nothing for the Government continued to ignore his vested constitutional right in this matter for a speedy trial, to his damage and detriment. The defendant performed every legal requisite to come within the scope of this valuable guarantee of the Sixth Amendment. The time element here in the delay of trial was unwaranted—and further,

was too long to be within the text and context of that term of a speedy trial guaranteed by the Sixth Amendment.

The Question as Here Presented—under These Identical Circumstances Has Never Been Ruled on by This Honorable Court. The Only Authority Available Is the Citation of Principles of Law as Laid Down by the Several Courts in Respect to This Matter. Those Principles of Law Have Been Cited by This Petitioner in His Original Brief and This Case Is Within Those Principles of Law Cited Where the Defendant Here Asked for and Demanded a Speedy Trial—once by letter, secondly by motion, and did not get it, then came before the Court asking by written motion that a directed verdict be granted in this matter which was denied over his proper and timely objection and for which he properly reserved his bill of exceptions. The Petitioner Does Respectfully Request That His Honorable Court Give This Matter Its Consideration and Rule on This Vital Question Presented.

Conclusion

In the Government's effort to set forth their contention that a single scheme and conspiracy was engaged in by all of the defendants in this Mass Trial—where the individual was lost in his own entity and being—the Government could not have done a better job for this petitioner than citing as an example the transactions of Miss Lorena Duling, for, in so doing, they have not only invited defeat of their contention from the evidence but are actually shown conclusively by such evidence there that the elements of agreement—knowledge—concert of action of the defendants there involved does not exist in a single conspiracy and scheme. In fact there may be shown several schemes there but not one as charged by the indictment and contended by the Government. Had there been one single scheme as the Government would have this Court believe—the evidence

would have revealed co-ordination and mutual assistance of action between the defendants there involved and not the separate efforts there shown by the evidence where there was the effort to arouse suspicion and to nullify the effect of the sales there made where such could not possibly come within the breadth and scope of a single scheme. Here was suspicion aroused by this petitioner and Overgaard by telling the investor-witness that her deeds were not correct —also that Safir advised her that he had seen Diaz and Silverman talking together when Diaz had emphatically stated to the witness that he did not know Silverman. Those acts are in fact acts to prevent sales rather than to make sales and cannot possibly come within the elements of agreement—knowledge and concert of action in a common enterprise. There is no better illustration of the fact on the non-existence of a single scheme than the careful study of the evidence here related and the petitioner here contends that the Government has done him a favor in opening the door for this matter to be shown in its true light.

The Government's contention in relation to the question of the issue of the "speedy trial" question has been adequately presented in this and the original brief.

It is respectfully submitted that the judgment be reversed.

RUBEIN V. JOHNSON.

INDEX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 486

RUBEIN V. JOHNSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S APPLICATION FOR REVIEW OF DENIAL OF CERTIORARI

To the Honorable Chief Justice and Associate Justices:

Preliminary Statement

Petitioner having properly filed Brief and Reply Brief in support of his Application for Certiorari on the above entitled case; and such having been heard and denied by this Honorable Court on October 28, 1946; Petitioner, then by Western Union Telegraphic Motion requested that, "A Stay of the Order of the Court Be Granted Him Pending

His Application For Review of Denial of Certiorari." Such stay was granted pursuant to Petitioner's requested action on October 30, 1946, and in accordance therewith, the Petitioner does herein set forth the following reasons for such review in the following terms, to wit:

Reasons for Request of Review of Denial of Certiorari

1

THAT THE TRIAL COURT SHOULD HAVE GRANTED THIS DEFENDANT'S MOTION FOR DIRECTED VERDICT WHICH MOTION WAS MADE AT THE OPENING OF THE TRIAL FOR THE REASON THAT THE DEFENDANT HAD BEEN DENIED A SPEEDY TRIAL GRANTED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner respectfully states that he believes that he has a true and just cause to complain of in the matter of the abridgment of his vested right to a Speedy Trial by the arbitrary act of Government such as was here the case. Petitioner has covered the factual and legal elements involved in his Brief and Reply Brief to the best of his ability as a layman not very well versed in law. He justly believes that the combination of those factual and legal elements which go to constitute his cause in this matter places him well within the sphere and scope of an invasion of that valuable guarantee of the Sixth Amendment.

Petitioner further believes that the Founding Fathers of this great nation, in their foresight, placed such guarantee of human right within the Sixth Amendment to prevent the arbitrary act of Government in relation to this matter; whereas, without such, that sacred guarantee would be lost in some instances, where officials acting under the color of authority could hide behind the cloak of their office with immunity to desecrate and ignore fundamental human rights in the proper and speedy adjudication of pending

indictments. Petitioner urges that the question at hand is vital and important NOT ONLY IN THE FACT THAT THIS CASE REPRESENTS AN INVASION OF THAT GUARANTEE, BUT FURTHER, THE DANGER OF PRECEDENT BEING MADE IN DENIAL OF CERTIORARI . . . FOR SUCH DOES THE DOOR FOR FURTHER ABUSE . . . IN THAT . . . (for illustration and an example) . . . WHY DELAY TRIAL FOR ONLY EIGHTEEN MONTHS IN THIS CASE? THE GREEN LIGHT HAS NOW BEEN GIVEN TO DELAY TRIAL AS LONG AS THE GOVERNMENT SEES FIT TO DO SO IN ANY CASE. IT MIGHT BE SIXTY MONTHS OR YEARS AT THE CONVENIENCE OF GOVERNMENT IN FLAGRANT DISREGARD OF THIS GUARANTEE OF THE SIXTH AMENDMENT. THUS, ONE MAY, IN EFFECT, BE IMPRISONED "without trial" INDEFINITELY BY AN ARBITRARY ACT OF GOVERNMENT THROUGH OFFICIALS ACTING UNDER THE COLOR OF THEIR AUTHORITY WHO WILL HAVE ONLY TO OFFER ONE EXCUSE AFTER ANOTHER TO SUIT THEIR OWN CONVENIENCE. NOT ONLY MAY ONE BE INDEFINITELY IMPRISONED WITHOUT TRIAL DUE TO HIS BEING UNABLE TO BE AT LIBERTY UNDER BOND BUT FURTHER IF HE IS AT LIBERTY UNDER BOND HE WILL HAVE TO BE SUBJECTED TO MENTAL STRAIN AND ANXIETY TO CAUSE HIM CRUEL AND UNUSUAL PUNISHMENT CONTRARY TO THE EIGHTH AMENDMENT; AND FURTHER, DENY TO HIM HIS RIGHT OF "DUE PROCESS OF LAW" IN RELATION TO THE RULES OF PROCEDURE PRESCRIBED BY THIS HONORABLE COURT. The resultant evils are many and almost unlimited in their breadth and scope.

This Court and secondary Courts have laid down certain principles of law in relation to this question BUT UNDER THE IDENTICAL FACTUAL AND LEGAL ELEMENTS HERE INVOLVED; THIS COURT HAS NEVER RULED ON THIS VITAL QUESTION WHERE ONE HAS COMPLIED WITH THE NECESSARY LEGAL REQUISITES TO COME SQUARELY WITHIN THOSE PRINCIPLES OF LAW. This petitioner has complied in every way with those requirements, inasmuch, as he has TWICE DEMANDED TRIAL, ONCE BY LETTER, ONCE BY MOTION, AND WAS TWICE IGNORED BY THE GOVERNMENT.

PETITIONER WHEN FINALLY BROUGHT TO TRIAL AFTER UNWARRANTED AND UNREASONABLE DELAY FILED A WRITTEN MOTION FOR DIRECTED VERDICT SUCH BEING DENIED, WITH PROPER EXCEPTIONS TAKEN BY YOUR PETITIONER. At no time . . . nor at any point has your petitioner acquiesced in this matter BUT THE CIRCUIT COURT OF APPEALS RENDERED AN OPINION IN RELATION TO THIS QUESTION DIRECTLY IN CONFLICT WITH ALL AUTHORITY AS PRESCRIBED BY PRINCIPLES OF LAW LAID DOWN BY THIS COURT AND SECONDARY COURTS IN RELATION THERETO, AND FURTHER, IN CONFLICT WITH THEIR OWN OPINION AS TO THOSE SAME PRINCIPLES OF LAW CITED IN A PRIOR CASE WHICH IS LISTED UNDER THIS PETITIONER'S BRIEF, WHERE IN SUCH CASE, WAS A RE-ITERATION OF OPINION IN CONFLICT WITH THEIR OPINION IN THIS CASE.

Petitioner believes that a grant of certiorari in this case will bring to light the true damage of the attendant evil of the invasion of his vested right in this matter, and further, will enable this Honorable Court to place a limitation on such unwarranted delays for all future time with clarity of thought and justice for all in relation to the factual and legal elements that go to constitute the cause of this Petitioner in this matter.

2

ADOPTION BY REFERENCE OF OTHER REASONS WHICH MAY BE RAISED BY COUNSEL OF PETITIONER'S CO-DEFENDANTS IN THEIR APPLICATION FOR REVIEW OF DENIAL OF CERTIORARI.

Petitioner does here adopt by reference, as fully so as if repeated word for word, any and all reasons and argument which shall be advanced by Petitioner's Co-Defendants—through their counsel—in their applications for Review of Denial of Certiorari, where such be applicable to the cause of this Petitioner.

Conclusion

The Petitioner respectfully submits that in his request for a Stay of the Issuance of the Order of the Court in Denial of Certiorari in his case—that such action was not therein requested for delay but in his sincerity of belief that this Honorable Court should review this matter because of the importance of the issues concerned, and that, Certiorari should be granted for the reasons herein stipulated.

Wherefore, Your Petitioner Prays:

This Honorable Court, under the authority vested therein, will review Order in Denying Certiorari and WILL ORDER that Petitioner's action in requesting a Grant of Certiorari be sustained.

Respectfully submitted,

RUBEIN V. JOHNSON,
Petitioner.

(7460)

INDEX

CITATIONS

717391—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 484

MILLARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. LEVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ, AND EMANUEL M. BURGIN, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 485

NATHAN SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 486

RUBEIN V. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 2397–2409) is reported at 156 F. 2d 386.

JURISDICTON

The judgment of the circuit court of appeals was entered July 10, 1946 (R. 2410), and petitions for rehearing were denied August 12, 1946 (R. 2440). The petitions for writs of certiorari were filed September 10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury with regard to (a) the presumption of innocence, (b) credibility of witnesses, (c) the failure of petitioners to testify, and (d) the requisite proof of petitioners' connection with the use of the mails.

2. Whether there was adequate proof of the uses of the mails charged, and that the mails were used in furtherance of the scheme to defraud.

3. Whether there was proof of a single scheme to defraud as charged in the indictment.

4. Whether "cash deeds" conveying parcels of land and undivided interests in royalties on aggregated parcels, coupled with collateral agreements and promises as to exploitation operations, are securities within the meaning of the Securities Act of 1933.

5. Whether petitioner Johnson was denied a speedy trial.

STATUTES INVOLVED

The Securities Act of 1933 (48 Stat. 74, as amended, 48 Stat. 905) provides in pertinent part as follows:

> SEC. 2 (1). The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. [15 U. S. C. 77b (1).]
>
> SEC. 17 (a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. [15 U. S. C. 77q (a).]

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

A seven-count indictment was returned in the District Court for the Eastern District of Louisiana on September 4, 1942, charging that petitioners and certain others[1] had conceived and executed a scheme to defraud certain named investors in the sale of securities and had used the United States mails in furtherance thereof (R. 2–36). The scheme to defraud is fully set forth in count 1 (R. 3–18) and incorporated by reference in all of the subsequent counts, each of which is predicated on a different mailing. Briefly, the scheme described in count 1 was that petitioners created and controlled the Plaquemines Land Company, which had acquired and owned considerable acreage of unimproved marsh and swamp lands located in Plaquemines and St. Bernard Parishes, Louisiana; that this land was leased to the Gulf Refining Company, giving Gulf the right to explore for oil on such land, with the lessor and lessee sharing the interest in any resulting mineral discovery; that petitioners then, by various fraudulent promises and misrepresentations, sold to various investors small parcels of the land together with fractional undivided interests in the mineral rights in larger tracts under lease to Gulf, the sales being evidenced by

[1] Others named in the indictment as confederates were Frank I. Kiefer, Jr., Henry Manzella, and Harvey M. Overgaard. Overgaard was named but not indicted because of his death prior thereto; defendant Manzella died prior to trial, and defendant Kiefer was in the Army at that time.

so-called "cash deeds", and that in caring out the scheme, petitioners employed vario devices described in the indictment, and more ully described in the discussion of the evide, *infra*, pp. 9–13.

Petitioners introduced no evidence on heir behalf but moved severally for directed vdicts on all counts after the Government had rted (R. 96–130). The attorney for the Goverment also moved to dismiss counts 6 and 7 bause of his inability to prove the use of the ms there charged (R. 1678). The court directeverdicts of not guilty on counts 3, 6, and 7 (R. 15, 133), and the jury found all the petitioners uilty on counts 1, 2, 4, and 5 (R. 133). Petitiors were given consecutive sentences on counts and 5, aggregating from 5 to 8 years, and a stence of 5 years each on counts 1 and 2 to ru concurrently with each other and with the ntences imposed on count 4 or counts 4 and 5R. 171–184). On appeal to the Circuit Court oAppeals for the Fifth Circuit, the convictis were affirmed (R. 2410).

The evidence in support of the convicns may be summarized as follows:

The Plaquemines Land Company w incorporated on March 14, 1911, under thlaws of Louisiana and domiciled in the Parish oOrleans (R. 1669; Gov. Ex. 413, R. 2291). The heme to defraud investors charged in the indictmt began in the late 1930's and continued throughe early

1940's. Many of the activities were carried on from the ostensible real estate offices maintained under the name of Kiefer and Silverman in New Orleans, in which many of petitioners were seen and business of the company transacted. (R. 1033–1042.)[2] The Plaquemines Land Company had acquired three large parcels of land aggregating over 40,000 acres in St. Bernard and Plaquemines Parishes in Louisiana, all of which was recorded under the name of Plaquemines Land Company. Various parcels of this land had been under mineral lease to the Gulf Refining Company beginning on June 13, 1935. The leases provided that Gulf would retain seven-eighths' interest in any minerals discovered, and that a one-eighth royalty on oil, gas, and other minerals found would go to the lessor in addition to the payment of an annual rental for the exploitation privilege. (R. 1596–1600.)[3] These leases, with one excep-

[2] A secretary employed at these offices testified as to coming to know Silverman, Diaz, Bird, Kaker, Kahn, Manzella, Kiefer, and Overgaard at the offices (R. 1036–1037) and as to the various activities of Plaquemines Land Company engaged in at those offices (R. 1036–1042).

[3] The leases to Gulf are shown in the record as follows:

Gov. Ex. 375, R. 1609, R. 2224–2235, covering St. Bernard Parish Land, dated June 13, 1935, expiring by its terms on June 12, 1940, release being issued by the Gulf company on August 1, 1940; Gov. Ex. 376, R. 1609, 2235–2244, covering St. Bernard Parish land, dated December 23, 1935, expiring for failure to pay rental on December 23, 1939, release being issued by the Gulf company on December 6, 1942; Gov. Ex. 377, R. 1597, 1600, 1609, covering St. Bernard Parish land, dated April 4, 1936, expiring after a ten year period; Gov.

tion, expired at intervals between December 1939 and May 1941 (R. 1601–1602). In the early part of 1940, petitioner Baker, president of the Plaquemines Land Company, contacted C. A. Lomax, a representative of the Gulf Refining Company, and requested that Gulf not terminate one of the then remaining leases (R. 1603). Mr. Lomax indicated that the company had finished its seismographic record of the land and was not interested in carrying the lease any longer (R. 1604). However, Baker asked Lomax whether he would not be willing to carry the lease on a free basis (R. 1604), telling Lomax that the reason for his request was that he, Baker, had deeds already printed which showed the land being under lease to Gulf (R. 1635). Lomax testified that he declined Baker's proposal because he was not joining any scheme to sell land (R. 1641), although final determination of that question was made by the Houston office of the Gulf company (R. 1642). Lomax further testified that while it was possible that there was oil on the particular lands and that Gulf could be mistaken, nevertheless this would be an "anomaly," and that from their in-

Ex. 378, R. 1609, 2244–2248, covering Plaquemines Parish land, dated April 24, 1936, release being issued by the Gulf company on September 23, 1941; Gov. Exs. 379, 379a, R. 1600, 1601, 2249–2252, covering Plaquemines Parish land, dated February 19, 1937, partial release issued by the Gulf Company on September 23, 1941; Gov. Ex. 380, R. 1600, 1602, 2253–2256, covering Plaquemines Parish land, dated May 26, 1937, expiring for failure to pay rental on May 25, 1941 release being issued by the Gulf company on May 6, 1942.

vestigation of the situation Gulf was satisfied that there was no oil there (R. 1614, 1624–1625).

Because of the size of the record and the number of investor-witnesses, it is impractical, within the limits of this brief, to set forth the details of all of the various sales made in pursuance of the scheme. Therefore, we shall describe the essential aspects of the scheme as generally practiced and illustrate with a few actual instances. The scheme was generally effected as follows:

One of the petitioners would approach an investor, in most cases an aged person and oftimes a woman (see, e. g.,[4] R. 292–293, 356–357, 465–466, 682–683, 965, 997–998, 1092), and offer to sell him or her a few acres, perhaps 5 or 10, of the Plaquemines Parish land. Typical representations made by the salesman to induce a purchase were that the land was in the heart of an area which was being heavily exploited by big oil companies, that Gulf Refining Company had an underlying lease on these very lands and was drilling for oil all around the area, and that, therefore, the investor would be wise to purchase the land which, when oil was discovered, as it undoubtedly would be, would become much more valuable (see, e. g., R. 348, 375, 509, 532, 571,

[4] As to each of the phases of the scheme and practices of petitioners, the record is replete with proof. We have for convenience confined our citation of record references to typical instances.

633, 789, 809, 849, 1067–1068, 1104–1105). In addition, the investor was often told that he would profit substantially on his share of the oil royalties that would be paid on the land, or that if he bought, he would get an oil well (see, e. g., R. 335, 342, 817, 1104–1105, 1136). Other misrepresentations were made, such as that the purchasers could live on the land or farm it (see, e. g., R. 532, 550, 788–789, 999, 1125). Additional sales were made to the same investors by one of several techniques. One device was to precede a second sales proposal with a visit by one of the petitioners, who touted the value of the land and the good sense or fortune of the investor in purchasing these oil properties, or who represented himself to be an agent of some large organization interested in buying large tracts of the land and paying a very substantial price, far above that which the investor had paid for the particular parcels, but stating that the organization would not purchase from the investor unless he had a larger tract to offer. Thereafter, another of the petitioners would call on the investor and offer to sell him additional parcels. The investor would then purchase additional land, but thereafter he would not see the party who had touted the value of the land or had offered to buy a large tract from him. (See, e. g., R. 559–574, 536–538, 805–810, 974–976, 906–922, 1163–1165.) Another technique was for one of the petitioners on the second or third visit to represent himself as an "insider"

in an oil company which was interested in buying up large parcels of the particular land and which would pay a very substantial price for such land. This "insider" would state that he could not go out and buy the land for his own account and resell it to the company because of his affiliation, but would offer to buy parcels of the land for the investor at a low figure and then resell it for the investor to his principal at a much higher figure, provided that he would be given an agreed substantial share (normally 15 or 20%) of the profit on such resale. The investor would then purchase some of the land which the "insider" obtained for him, but it was never resold as promised. (See, e. g., R. 414–415, 498–499, 509–512, 560.) While the foregoing techniques and misrepresentations were the principal ones practiced by the petitioners to sell the land, there were others, which will appear as transactions with some of the investors are detailed.

In effecting the foregoing sales devices, petitioners transacted business with the numerous investors in varying combinations. In every instance, from two to eight of the petitioners would see a particular investor at different times and in varying roles. In one case, a particular petitioner might be the original salesman, another petitioner the "independent purchaser" or touter giving the investor the impression that outsiders were interested in purchasing the land at high

prices, and a third or fourth petitioner would then make a second or subsequent sale. In another transaction petitioners would shift roles and the one who had previously played the part of salesman might become the independent purchaser. The record is replete with evidence showing that each of the petitioners at one time or another worked with most, if not all, of the other petitioners in connection with various sales. It is, of course, impossible within the limitations of this brief to detail the evidence showing these inter-relationships. However, an analysis of the record illustrating these connections is attached as an Appendix.

After the investor had agreed to purchase parcels of the land in Plaquemines Parish, and had given the salesman cash, checks [5] or notes to cover the purchase price, he received a so-called "cash deed" from Plaquemines Land Company as grantor over the signature of Baker as president thereof. The "cash deeds" were all substantially the same, and, in addition to the provisions describing and conveying the parcels sold to the investor, contained, without exception, provisions

[5] Many of the checks were made payable to Plaquemines Land Company (see, e. g., Gov. Ex. 84, R. 1874; Gov. Ex. 86, R. 1879; Gov. Ex. 136–137, R. 1977). Those checks made payable to one of the petitioners were, in many instances, endorsed by one or more of the other petitioners (see, e. g., Gov. Ex. 33, R. 1785; Gov. Ex. 80, R. 1868; Gov. Ex. 83, R. 1873; Gov. Ex. 87, R. 1879; Gov. Ex. 89E, R. 1881; Gov. Ex. 94A, R. 1897).

such as the following (Gov. Ex. 20 at R. 1768–1769):

> The vendor hereunder reserves All of the mineral rights on the land herein transferred and in lieu thereof the said Plaquemines Land Company does by these presents grant, bargain, sell, set over, abandon and deliver with full warranty of title unto the purchaser of above described tract of land *An Undivided Prorata Part of All the Mineral Rights on the following described lands (of which the acreage herein transferred forms a part), as the acreage herein transferred bears to the whole.* Said lands being located in Plaquemines Parish in Township 16 South Range 16 East, to-wit: [followed by legal description of the sections subject to a Gulf lease]
>
> Under date of May 26, 1937, the Plaquemines Land Company granted unto and in favor of the Gulf Refining Company a ten year mineral lease covering the 1635 acres above described. Which mineral lease provides for payment to owner or owners thereof as their interest may appear of record of the usual one-eighth royalty on all oil, gas, and other minerals found and saved from said land and for an annual rental of twenty-five cents (25¢) per acre per annum pending drilling. Which mineral lease is recorded C. O. B. 85, folio 65. [Italics supplied.]

In almost every instance, the deed had either already been recorded when it was received by the investor from one of the petitioners person-

ally or by mail, or one of the petitioners assisted the purchaser in accomplishing the recordation (see, e. g., R. 349, 479–480, 790, 833–834, 1378). The deputy clerk of court at Point a la Hache, Louisiana (Plaquemines Parish), testified that it was the practice for Baker to mail or bring the deeds to his office and request him to record them and either return them to Baker or mail them to the indicated grantee (R. 1644). Moreover, each of the cash deeds delivered to the purchasers contained a clause stating that "Internal revenue stamps as required by law have been attached to *recorded* copy and cancelled" [Gov. Ex. 112 at R. 1949; italics supplied].

Transactions with typical individual investors were as follows:

In June 1941, petitioner Safir contacted Andrew E. Dupre, secretary of the New Orleans Athletic Club, for the purpose of selling him some of the Plaquemines land. Safir stated that the land was very valuable, and that drilling for oil would take place in the very near future. He showed Dupre a map and pointed out the Quarantine Bay area, which was near the Plaquemines Parish land, and stated to Dupre that the land he intended to sell him was along that section. He told Dupre that if a large company drilled, Dupre would participate in the proceeds on a per acre pro rata basis. Dupre thereupon purchased five acres at $25 per acre. (R. 397–400.) In August 1941, Dupre purchased an additional five

acres at $25 per acre from Safir (R. 405). Thereafter, in early September 1941, petitioner Kahn called upon Dupre and told him that he had found out from the public records that Dupre had purchased land in Plaquemines Parish and that a friend of his would like to discuss a similar proposition. Petitioners Kahn and Levy talked with Dupre, and Levy asked Dupre if he would be interested in purchasing more of the land at $60 per acre. Levy distinguished his proposition from the previous purchases made from Safir by telling Dupre that he would give Dupre a one-eighth royalty interest, whereas in Safir's sales, Dupre had obtained only a one-sixteenth interest. Levy further told Dupre that he was blocking a large portion of this particular land for the purpose of reselling it to associates in New York City. Dupre then purchased five acres at $60 per acre. (R. 406–410.) Later in the month of September, Kahn and Levy visited Dupre again and persuaded him to purchase five more acres by telling him that there had been a lot of activity in connection with the land and that they wanted to offer him some more of the land which a friend of theirs had purchased but could not pay for (R. 411–412). Subsequently, in September or October 1941, petitioners Levy and Kahn again sold Dupre five additional acres at $60 per acre on the representation that the land would be sold in New York at a very handsome

717391—46——3

profit, and that they would all participate in the profit on the resale (R. 413–415). Notwithstanding these repeated promises that the land would be resold, it never was (R. 417).

Prior to 1941, Rubein Johnson had sold some land in Texas to Miss Lorena Duling, a 78-year-old retired school principal in Jackson, Mississippi. That transaction was not, as she testified, "successful." In January or February of 1941, petitioner Silverman contacted Miss Duling and told her that Johnson was sorry about the Texas transaction and desired to give her five acres of Plaquemines Parish land. The "gift" was made, but three days later Silverman told her that she would have to pay $250, which represented one-half of the purchase price. She made this payment to Silverman, who told her that it was almost a certainty that some large oil concern would extend its holdings to the area close to her five-acre plot, that she would have to have twenty acres in order for her five-acre plot to be valuable, since twenty acres were necessary to have a drilling site, and that there was no doubt at all that within thirty to sixty days her land would be a desirable drilling site. Thereupon, Miss Duling purchased an additional fifteen acres at $90 per acre for a total of $1,350, which she paid in cash to the defendant Silverman. Silverman told her not to sell the land, because he believed that within a few days or weeks it would increase in value very much and that a big oil concern would pay

a good price for the property. He also told her not to sell unless she communicated with him and that he thought she could get as much as $200 an acre. (R. 893–900, 937–940.)

Petitioner Diaz then contacted Miss Duling and told her that he was a field buyer for one of the big companies and that he had found from the public records that she owned oil land. He offered to buy her parcels at $135 per acre and later in the afternoon increased the offer to $185 per acre on the ground that he had been so authorized by his company. He further told her that if she had more land in the same section, it would be more valuable. She told Diaz that she couldn't sell without consulting Silverman, whom Diaz denied knowing. Diaz told Miss Duling that when she got ready to sell, to communicate with him in New Orleans. She never saw him thereafter. (R. 906–919.) After the Diaz visit, Silverman advised Miss Duling not to sell and to purchase more land in the same locality. She then purchased a substantial quantity of land from Silverman at $90 and $100 per acre (R. 915–922). Petitioner Safir saw Miss Duling near the end of her transactions with Silverman and sold her five acres at $90 an acre after advising her to purchase the five acres because it would fit in the corner of her land and would thereby be a valuable piece of land to have (R. 925). Miss Duling, during the course

of the foregoing transactions, invested her total life savings, in the amount of $9,750 (R. 930).

ARGUMENT

The facts set forth in the Statement, *supra*, make it clear, as the court below well said, that "the proof presents a record of rascality and scoundrelism of the meanest and lowest kind, with a grinding of the faces of the poor * * *" (R. 2407). Petitioners, however, claim that numerous errors were committed by the trial court as a result of which their convictions should be reversed. Since the contentions in all three petitions are substantially the same, we will discuss them together in the following groupings and order:

1. Errors in the instructions with regard to—
   (a) Presumption of innocence;
   (b) Credibility of witnesses;
   (c) Refusal of petitioners to testify;
   (d) Mailings.
2. Proof of the mailing involved in count 4 and its relation to the scheme to defraud.
3. Proof of petitioners' connection with the mailing involved in count 5 and the relation of the mailing to the scheme.
4. Proof showing a single scheme as charged in the indictment.
5. Proof of mailings in counts 1 and 2.
6. Whether the "cash deeds" involved in counts 1 and 2 are securities within the meaning of the Securities Act of 1933.

1. (a) The trial judge instructed the jury on the presumption of innocence as follows (R. 1703–1704):

> * * * The defendants are not called upon to prove themselves innocent of such charges; they may rely upon the presumption of innocence that attends them at all times until and unless, in the course of the trial, they are proved guilty beyond a reasonable doubt. The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each of the defendants beyond a reasonable doubt. But, as forceful as that rule is in the protection of one who stands charged with crime, it must not be forgotten that it is not intended, nor has it ever been intended, as extending aid to one who in fact is guilty, so that he or she may escape just punishment. The rule is but a humane provision of law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but nothing more. You must, of course, give serious consideration to this presumption of innocence, when, once having retired to deliberate upon your verdict, you review, weigh and consider the whole body of the evidence. As I have stated, the burden rests upon the government, remember to prove, beyond a reasonable doubt, that the defendants are guilty of the charges laid against them in the indictment. But this presumption of innocence will avail the defendants no further, so

> soon as prima facie evidence of ...e truth of the charges laid against the ... in the indictment is presented to the ju... That prima facie evidence, if it sa...fies the jury, beyond a reasonable doul... of the guilt of the defendants bars the ...resumption of innocence, because the pr...umption is no evidence at all, and play... its part only so long as there is absenc... of legal evidence as to the particular f...t to be established. If such prima facie ...vidence, which so brushes aside the presu...ption of innocence when found worthy of ...elief by the jury, is not met by the defen...nts' opposing satisfactory evidence, ...en that simple prima facie evidence, if it ...nvinces you gentlemen of the jury, as ...he final judges of the fact, that guilt ...as been proved, beyond a reasonable dou..., would justify you in rendering a verdic...f guilty as charged. * * *

At the conclusion of all of his instruc...ons, the judge asked whether there were any ...jections or exceptions to the charge, because ...if any counsel believes the Court has fallen in... unconscious error, the Court will gladly hea... suggestions from them for the possible correct...n of the error" (R. 1723). Counsel for the peti...oners in No. 484 raised a question as to the cla...y of the instruction regarding the effect of pr...a facie evidence (R. 1723–1724), whereupon ...e court further instructed the jury (R. 1724):

> During a part of the Judge ... charge, there was specific reference to t... subject

> matter to which Mr. Wilkinson referred and addressed the Court on, and the Court did charge you, and did intend to charge you, that if there is a case made out before you, beyond a reasonable doubt, by simple prima facie evidence, that would justify a verdict of guilty. There is no requirement under the law that any defendant offer any testimony. However, if the prima facie evidence, considered by you and deliberated over, convinces you beyond a reasonable doubt that the fact sought to be established has actually been established and proved to you in that fashion, beyond a reasonable doubt, that would justify action by you including a verdict of "guilty". * * *

The judge then asked whether that was "a satisfactory explanation or not," to which counsel replied, "I think so" (R. 1724). No other objections or exceptions were taken by any other of the defense counsel to the instruction in question here (see R. 1723–1739).

The court below held that under the foregoing circumstances petitioners were in no position to claim that error was committed by the trial court (R. 2403). We believe this conclusion is entirely correct, and that petitioners' contentions here that the instruction was highly prejudicial and erroneous (No. 484, Pet. 26–30; No. 485, Pet. 23–32; No. 486, Pet. 14–16) is without merit. In *Gomila v. United States*, 146 F. 2d 372 (C. C. A. 5), upon which petitioners rely, a similar inartfully worded instruction that prima facie proof of guilt beyond

a reasonable doubt is sufficient to overcome the presumption of innocence was held to be erroneous and that such error, accumulated with other errors which made the case a doubtful one on the evidence, required a reversal of the conviction. That is not the situation here. Moreover, the general tenor of the judge's charge on the presumption of innocence was not objectionable. At the outset of the disputed instruction, the trial judge emphasized that the defendants were not called upon to prove themselves innocent but could "rely upon the presumption of innocence that attends them at all times until * * * they are proved guilty beyond a reasonable doubt" (R. 1703). Although he spoke of overcoming the presumption by prima facie evidence, he explained that such evidence must be sufficient to convince the jury beyond a reasonable doubt, and that it could not be thus effective, unless not met by the defendants' opposing satisfactory evidence (R. 1703–1704). Moreover, since additional instructions on this point requested by one of the defense counsel for purposes of clarification were considered satisfactory by such counsel, and since no other objections to this charge were made, it is clear that later contentions on appeal attacking the instruction as unfair and improper were mere afterthought. An almost identical charge was involved in *Pasqua* v. *United States*, 146 F. 2d 522, arising in the same circuit court of appeals. In that case, as here, no timely objection

to the charge was made, and the Fifth Circuit held that "while that charge contains errors, the guilt of the defendants is so overwhelmingly shown by the record that we think the administration of justice does not require us to take notice of such errors." (146 F. 2d at 524.) This Court denied a petition for a writ of certiorari in which that conclusion was urged as error. 325 U. S. 855. Cf. also the charge in *Allen* v. *United States,* 164 U. S. 492, 500. And so here, in view of the overwhelming proof of guilt, the circuit court of appeals properly rejected petitioners' objection to the charge on the presumption of innocence, raised for the first time on appeal. *Johnson* v. *United States,* 318 U. S. 189, 201; *Holmgren* v. *United States,* 217 U. S. 509, 523–524; *Allis* v. *United States,* 155 U. S. 117, 122.

(b) For similar reasons there is no merit in petitioners' complaint (No. 484, Pet. 32–34) as to the court's instruction to the jury that "you will bear in mind that, under the law, every witness is presumed to speak the truth" (R. 1704). The foregoing sentence quoted by petitioners was immediately preceded by the instruction (not quoted) that (R. 1704):

> * * * In considering the credence and weight you should accord the testimony of any witnesses that you have heard testify, you will, as reasonable men, judge his or her demeanor on the witness stand, the manner of his or her testifying, which

717391—46——4

> may or may not have demonstrated to you an apparent lack of fairness, and unexplained hesitation or evasion in replying to any question or questions, or any bias or prejudice, either for or against either the government or any one or more of the defendants. * * *

While a court's statement that witnesses are presumed to tell the truth standing alone might under some circumstances be prejudicial, it could not be thus considered here, since it was tempered by the immediately preceding statement which unequivocally and properly left to the jury the function of judging the credibility of the witnesses from their demeanor in testifying, unexplained hesitation or evasion, or bias or prejudice. Moreover, in considering the claimed possibility of prejudice, it should be noted that the government witnesses were not impeached nor was there any material inconsistency in their testimony on direct and on cross-examination. These circumstances, coupled with petitioners' failure to make any objection or exception to the instruction (see R. 1723–1739), their failure to urge this point as error before the court below, and the overwhelming proof of guilt, forecloses petitioners' contentions that the instruction constituted reversible error.

(c) After the trial judge delivered his original instructions to the jury, counsel for petitioners Bird, Diaz, and Silverman requested him to charge the jury further to the effect that their

failure to take the stand would not give rise to any presumption against them. The other petitioners stated that they did not desire to join in this request. The court refused the charge, stating that the question was "elementary." (R. 1725–1729.) After the jury had been out approximately six hours, the judge recalled them, and, among other things, gave the jury the instruction that had been requested earlier, preceded by the statement to the jury that the court was in error in not granting the instruction when originally requested (R. 1736–1739). The judge then asked whether there were any objections or exceptions to this supplemental charge, but none was made (R. 1739). Petitioners' contention here, as in the court below, that this action of the judge constituted reversible error (No. 484, Pet. 34–36; No. 485, Pet. 34–37; No. 486, Pet. 12–14), is conclusively answered by the opinion below (R. 2404–2405):

> * * * Those defendants who told the court that they did not want any exception to the refusal of the court to give the charge certainly cannot be heard to complain of its not being given when first requested. The other defendants, who did ask for it and who, because they asked, were entitled to it and could, therefore, have complained if it had not been given,* are in no better case. Before the jury brought in its verdict, the court, after

*Bruno v. *United States*, 308 U. S. 287.

frankly confessing error, gave a full and correct charge on the point, and the defendants neither excepted to its giving nor asked further instruction. It is universally held that when an error has been committed and later it is corrected in a formal ruling of the court, it may not be assigned unless it is made clearly to appear that the situation was such that the correction did not remove the effects of the error complained of.** Appellants argue that this is such a case: that the jury having been allowed to go without being properly instructed and having deliberated for many hours, no doubt in that time discussing the failure of the defendants to testify, it was too late to do any good to instruct them in the matter just before they brought in the verdict. On the other hand, it may be more cogently argued that if when the jury came in for instructions they had not been able to make up their minds, but were still undecided, this charge given at defendants' request might well have been of the greatest value to them, indeed of far more value than if given as a part of the general charge. But these are speculations. The law is settled that cases are not reversed unless it appears that the error complained of has reasonably prevented substantial justice being done. Where, as here, the error has been openly confessed and deliberately corrected, with no complaint of

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**_Volkmor_ v. _U. S._, 13 F. (2) 594; _Frantz_ v. _United States_, 62 F. (2) 737.

> or exceptions to the manner or substance of the correction made at the time, the original failure to give the charge certainly can not be held reversible error.***

***Johnson* v. *U. S.*, 318 U. S. 189; *United States* v. *McGuire*, 64 F. (2) 485; *Burton* v. *U. S.*, 196 U. S. 283; *State* v. *Moody*, 167 Pac. 676.

Petitioners quote a part of the trial judge's instructions on the question of proof of mailing wherein the trial judge told the jury that (R. 1714)

> Under such state of facts, it is not necessary for the jury to find that it was any defendant on trial who has been proved to have "placed" or "caused to be placed" [matter in the mails in executing the scheme].

Petitioners contend that the judge committed a very fundamental error in giving this instruction in that he told the jury in effect that petitioners need not be shown to have had any connection with the mailing in order to find them guilty (No. 484, Pet. 36–37). If the foregoing quotation were the only charge given the jury on the question of the required connection with the mailings, there might be some merit in petitioners' position. However, petitioners have extracted this portion of the charge from its context; the entire charge on this subject made it clear that the jury could not find petitioners guilty unless they were shown to have had some connection with the mailing. Thus, in the sentences immediately preceding that

quoted by petitioners, the judge instructed (R. 1713–1714):

> * * * The word "caused" in the phrase used "placed or caused to be placed" in the mails has a relatively broad meaning and importance as the Supreme Court of the United States has held, and is used in the mail fraud statute in its well known sense of "bringing about". Therefore, when the indictment charges that these defendants "caused to be placed" certain therein described mailable matter, under the remaining counts four and five, of the original four mail fraud counts, the said defendants are one and all charged with having brought about the use of the mails in the execution of their alleged previously concocted scheme and artifice to defraud,—no matter that none of them ever contemplated or intended the use of the mails for the carrying out of such scheme;—no matter that none of them knew that the mails were being so used, they are, one and all, responsible for such misuse of the mails, if the use of the post office establishment was the natural, proper consequence of their act in so forming and planning said scheme or artifice to defraud, and might reasonably have been anticipated and foreseen by them.

This instruction was a sound exposition of the applicable legal principles. See, e. g., *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Kenofskey,* 243 U. S. 440, 443; *Graham* v. *United States,* 120 F. 2d 543, 546 (C. C. A. 10);

United States v. *Weisman,* 83 F. 2d 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Corbett* v. *United States,* 89 F. 2d 124 (C. C. A. 8); *Smith* v. *United States,* 61 F. 2d 681, 684 (C. C. A. 5), certiorari denied, 288 U. S. 608. It is apparent, therefore, that the charge as a whole gave the jury a clear and correct impression of the legal principles applicable in determining petitioner's responsibility for the use of the mails. That it must have been so understood by petitioners is apparent also from the fact that no objection or exception of the character here in question was made when the instruction was given (see R. 1723–1739), nor was this point raised in the court below. Under such circumstances, petitioners are in no position to make such a contention here.

2. Count 4 of the indictment was based upon a sale by petitioner Diaz to Mr. and Mrs. M. E. Fowler (R. 28–29). In connection with that sale, Mr. Fowler gave Diaz a check dated June 26, 1940, for $1,395, drawn on a Pensacola, Florida, bank, payable to Diaz (Gov. Ex. 323, R. 2155). Diaz deposited the check in his New Orleans bank, and thereafter, according to the testimony of an official of the New Orleans bank, the check was cleared in the ordinary course of business through the United States mails for collection on the drawee bank in Pensacola (R. 1026–1030). Petitioners raise several objections to the proof on this count. First, they argue

that the use of the mails was not clearly shown, since the envelope in which the check was transmitted was not introduced in evidence, and because the use of the mails was proved only by custom and usage; and second, that the clearance of this check through the mails was not part of the scheme to defraud but came after the completion of the particular sale in question, so that mailing was not a basis for conviction for mail fraud under the controlling authority of *Kann* v. *United States,* 323 U. S. 88 (No. 484, Pet. 22–23, 43–44).

As to the first objection, introduction of the envelope is not an absolute prerequisite to proof of mailing, and the testimony of a bank official based on custom and usage and upon special markings on the check itself, are sufficient evidence from which a jury could infer, as the jury here apparently did, that the check was actually transmitted through the mails. *Decker* v. *United States,* 140 F. 2d 378, 379 (C. C. A. 4), certiorari denied, 321 U. S. 792; *United States* v. *Leathers,* 135 F. 2d 507, 510 (C. C. A. 2); *Savage* v. *United States,* 270 Fed. 14, 20–21 (C. C. A. 8), certiorari denied, 257 U. S. 642. The second question raised by petitioners, as to the application of the *Kann* case, at first blush appears to have some merit. The instant case is parallel to the *Kann* case in that, in a sense, Diaz might be said to have had the fruits of his fraud in hand prior to the mailing of the check, and, in addition, the particular

sale to the Fowlers, in connection with which the check was given, had been made prior to this mailing. However, the parallelism ends at this point. This sale to the Fowlers in June 1940 was only one in a series of numerous sales made by various petitioners to them during a period from March 1939 to March 1941 (cf. R. 1192, 1282), and all of these sales were, in turn, only one small part of the scheme in its totality. The scheme charged and proved was a continuing one which was far from complete at the time the particular check was cleared through the mails. And it was necessary to its execution that nothing should arise at any time which would create suspicion on the part of any of the investors; everything had to work smoothly to keep all of the investors lulled into the feeling that they were participating in an honest and fruitful enterprise. It follows, therefore, that it was essential to the scheme to defraud and to the continuing activities of petitioners that the check should clear smoothly and in proper fashion. Under such circumstances, in view of the scope and continuing character of the scheme to defraud, it cannot be said, as in the *Kann* case, where only a single and short lived scheme was involved, that the clearance of the check was brought about after the scheme had reached fruition. On the contrary, as in *Decker* v. *United States, supra,* in which certiorari was denied on March 27, 1944, shortly before the granting of

certiorari in the *Kann* case, 321 U. S. 761, the mailing by the bank here was intimately connected with and essential to the smooth and uninterrupted functioning of the continuing scheme. See also *Corbett* v. *United States,* 89 F. 2d 124, 125–126 (C. C. A. 8).

3. In respect of count 5, petitioners in No. 484 contend that the proof was insufficient both as to their connection with the mailing and as to showing that the mailing was a part of the scheme to defraud (Pet. 49–50). Count 5 was predicated on one of the transactions with Miss Duling, in connection with which she received, at Jackson, Mississippi, a recorded "cash deed" mailed from the clerk's office at Pointe a la Hache, Louisiana, on April 15, 1941. No question is raised as to proof of mailing, since the envelope in which the deed was transmitted was introduced in evidence (Gov. Ex. 74, R. 1861). The claim that some of the petitioners were not shown to have had any connection with this mailing is negated by the proof, outlined in the Statement, *supra,* and analyzed under point 4, *infra,* showing that all of the petitioners were engaged in a single, continuing scheme to defraud. Petitioners, however, urge that the mailing of this deed was no part of the execution of the scheme to defraud, since Miss Duling had already paid money for the tract involved and acquired title prior to this mailing, and they cite the second decision of the Circuit Court of Appeals for the Tenth Circuit in *Mitchell*

v. *United States*, 126 F. 2d 550. The first *Mitchell* decision, 118 F. 2d 653, was based upon an indictment charging mail fraud in connection with a single transaction involving the sale of land. The mailing was predicated, as in the instant case, on the transmittal of a recorded deed to the purchaser. The Tenth Circuit held that the mailing of this recorded deed played no part in the execution of the scheme charged in the indictment, since that scheme did not envisage recording and was complete before the mailing occurred. Thereafter, the Government secured a new indictment charging, as here, a continuing scheme to defraud many victims. On appeal from the second conviction, the Tenth Circuit held that the conviction was good on the basis of the proof adduced and was within the framework of the indictment, since recording was envisaged by the continuing character of the fraud charged and proved. It is apparent, therefore, that the first *Mitchell* decision has no application here and that, as in the second case, the indictment and proof here showed that the mailing of the recorded deed occurred in the course of a continuing scheme to defraud both the particular investor and other investors. Not only were other sales subsequently made to Miss Duling (see Gov. Exs. 75–76, R. 1861–1866), but the sale in question was not complete until she received the "cash deed" mailed on April 15, 1941. Moreover, it is evident that recordation played a vital part in petitioners' scheme (see Statement, *supra*, pp.

13–14) in that it lent an air of authenticity and propriety to the transactions, and thus allayed suspicion while petitioners practiced their scheme to load and reload the particular investor and to ensnare other victims. Cf. *United States* v. *Earnhardt,* 153 F. 2d 472, 473–474 (C. C. A. 7), certiorari denied June 3, 1946, No. 1158, O. T. 1945. Under such circumstances, the recordation was far from an incidental or collateral phase of the scheme, but was an integral part of its execution.

4. Petitioners also contend that while the indictment charged a single scheme to defraud and they were tried and convicted on this theory, the proof in fact showed several separate and independent schemes (No. 484, Pet. 51–52; No. 485, Pet. 8–22; No. 486, Pet. 21–22). Ancillary to this argument are the several contentions that proof of one petitioner's connection with a particular sale or mailing could not be effective against the others (see, e. g., No. 484, Pet. 44–45, 50; No. 485, Pet. 15–16). Petitioners rely upon the recent decision of this Court in *Kotteakos* v. *United States,* decided June 10, 1946, Nos. 457 and 458, O. T. 1945.

It is settled, of course, that in a mail fraud prosecution, the Government need only establish that particular transactions were in furtherance of a common scheme in which various defendants are implicated, not that each defendant participated in each transaction. *United States* v. *Cohen et al.,* 145 F. 2d 82, 90–91, (C. C. A. 2), cer-

tiorari denied, 323 U. S. 799. The only question for discussion, therefore, is whether the proof showed that petitioners were, as charged, implicated in a single scheme to defraud. From the character of the proof summarized in the Statement, *supra*, particularly on pp. 9–13, it is abundantly clear that petitioners can draw no comfort from the *Kotteakos* decision and that one single scheme was established. As the court below stated R. 2408):

> * * * the record leaves in no doubt that they formed one wolf pack. It shows a concerted, plotting, scheming, and conniving in loading and reloading their victims, a concerted scurrying hither and thither to find, a concerted stealthy stalking of their prey. It shows, too, a perfect timing in crowding their victims and in the final moving in for the kill. This could not have been possible had there been no general understanding, no underlying plan.

This concerted plotting and conniving is evident from several different aspects of petitioners' activities. Thus, in almost every case, the so-called "cash deeds" which the various investors received were signed by Baker as president of the Plaquemines Land Company. Most, if not all, of the petitioners at one time or another represented to various investors that they were working for or connected with the Plaquemines Land Company. The record also shows that the combinations of petitioners which operated in

"wolf packs" against various investors shifted at various times, so that at one time or another every petitioner worked with almost every other petitioner in effecting sales. The shifting of personnel and the relations of petitioners to each other is unequivocally shown in the Appendix, *infra,* pp. 46–48. In this setting the *Kotteakos* decision, where the only common denominator between all the defendants was the isolated fact that a single defendant was shown to have had dealings with all the others, is inapposite. As in typical mail fraud, security fraud, and narcotics ring cases, this case is one in which all of the petitioners were shown to have been working in a common scheme under common direction, with a common interest and profit and with mutual relationships and timing of action in which the activities of one were intimately related to the activities of the others. This was no mere thread that bound petitioners together, but rather a mutually binding chain of a common effort under which they were working one for all and all for one. Therefore, there was no error whatsoever in charging, trying, and convicting petitioners on the theory, abundantly proved by the evidence, that they were engaged in a single conspiracy.

5. Petitioners also complain of the proof of mailings on which counts 1 and 2 were predicated (No. 484, Pet. 38–39). Since, as we have shown, petitioners were validly convicted under counts 4 and 5, and since those counts sustain

the concurrent sentences imposed, it is unnecessary to inquire into the validity of the convictions on counts 1 and 2. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105. In any event, petitioners' contentions in respect of these counts are untenable.

Counts 1 and 2 alleged the mailing of certain letters addressed to the Deposit Guaranty Bank, Jackson, Mississippi, on the letterhead of petitioner M. C. Baker, 2110 Audubon Street, New Orleans, Louisiana, and signed in his name as president of the Plaquemines Land Company (R. 19–22; Gov. Ex. 143–144, R. 1992–1994). Each of the two letters stated that there were enclosed the original and two copies of a deed executed by Plaquemines Land Company in favor of Nathan Silverman for acreage (10 and 5 acres, respectively) in Section 30, Township 17 South, Range 17 East. An officer of the addressee bank testified that the letters were received by the bank through the mails, for they bore a stamp of the bank's mail department which was placed only on letters received in the mails (R. 450–456). While the deeds were not introduced in evidence, the bank official identified bank records showing that the enclosures had been received and that, as requested in the letters, credits had been entered in the Hibernia National Bank for the account of the Plaquemines Land Company for the money paid when the deeds were delivered in accordance with the instructions in the letters (R. 450–451; Gov.

Ex. 143a, R. 1992; Gov. Ex. 144a, R. 1994). In addition, the record shows that the parcels of land referred to in the letters were included in a tract under an exploitation lease to Gulf Refining Co. which provided for the division of undivided royalty interests among the owners of parcels in the tract, and that parcels in the same section (30) were sold by Silverman to Miss Duling, of Jackson, Mississippi (see R. 923; Gov. Ex. 75, R. 1861–1863). In view of the testimony of the bank official, there can be no question as to the adequacy of the proof of the receipt of the letters through the mails. And that they were mailed by Baker, acting for Plaquemines Land Co., whose purported signature the letters bore, is evident from the following: (1) the letters referred to land which Plaquemines Land Co. controlled; (2) credits for the payments for the parcels referred to in the letters were, in accordance with instructions in the letters, made and received for the account of Plaquemines Land Co.; and (3) Baker and Silverman were shown by other substantial evidence to have had close relationships in the affairs of the Plaquemines Land Co. Cf. *McNear* v. *United States,* 60 F. 2d 861 (C. C. A. 10). Moreover, since the letters carried a letterhead with a New Orleans address which was shown to be the base of operations for Plaquemines Land Co., there was substantial basis for inferring that the mailing occurred in New Orleans. Cf. *McIntyre* v. *United States,* 49 F. 2d 769 (C. C. A. 6). These

factors collectively were sufficient circumstantial evidence to establish a prima facie case to go to the jury for their determination whether Baker mailed the letters from New Orleans to the bank in Jackson. Cf. *Steiner* v. *United States,* 134 F. 2d 931, 934 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Corbett* v. *United States,* 89 F. 2d 124, 127 (C. C. A. 8); *McNear* v. *United States,* 60 F. 2d 861, 863 (C. C. A. 10); *McIntyre* v. *United States,* 49 F. 2d 769 (C. C. A. 6).

6. Petitioners argue further that there was no proof of the character of the deeds enclosed with the letters involved in counts 1 and 2, since these deeds were not introduced in evidence, and that even if the deeds were presumed to be like the other "cash deeds" in evidence, they were not securities within the meaning of the Securities Act of 1933 (No. 484, Pet. 40–42; No. 486, Pet. 9–12). However, there was an abundance of circumstances from which the jury could properly have inferred that these deeds were typical of the many "cash deeds" in evidence. Briefly, those circumstances were that the parcels referred to in the letters were included in a section and a larger tract controlled by Plaquemines Land Co. and sold to numerous investors by petitioners in small parcels of a comparable size; that the large tract referred to in the letters was under an exploitation lease to Gulf Refining Co., under which royalties were reserved to the title

holders; that in every other of the many instances of sales of parcels of the land in the tracts under lease to Gulf, petitioners employed the "cash deed" device; and that Baker and Silverman were principal figures in the operations of Plaquemines Land Co. It is apparent, therefore, that the jury properly concluded that the deeds referred to in the letters upon which counts 1 and 2 were predicated must have been so-called "cash deeds."

The "cash deeds" utilized by petitioners were, by their language and the circumstances of their use, securities under Section 2 (1) of the Securities Act of 1933 (*supra,* p. 3), both as "fractional undivided interests in oil rights and as "investment contracts." The deeds typically recited that the grantee was given, in addition to the land, less the mineral rights therein, "an undivided Prorata Part of All the Mineral Rights" in the larger described tracts already under a lease providing for payments of royalties to the land owners (see Statement, *supra,* p. 13). By its literal language, therefore, the "cash deed" conveyed to the investor-purchaser not merely particular acreage, but also an undivided share with other investor-purchasers in potential oil royalties. In terms the deed falls squarely within the meaning of a "security" as defined in the Securities Act, which includes, *inter alia,* "fractional undivided interests in oil

and gas right" (see p. 3, *supra*).[6] And the substance of the transactions with the many investor-purchasers supports the conclusion that petitioners were selling "investment contracts" within the meaning of the definition "security" in the Act. Petitioners impressed investors with the fact that they were selling the land because of its value as oil land and for the profit that the investors might realize from their undivided interests in the royalties that would result from exploitation, or from resale of the acreage by the promoters. Indicative of the intent of the promoters is the fact that they had attempted to persuade the Gulf Refining Company to continue its exploitation leases and that the promoters' objective was to enable them to represent that the lands were under exploitation by Gulf. Moreover, the land conveyed by the "cash deeds," being marsh land unsuitable for residential or cultivation purposes, had little or no value independent of the success of the promised oil exploitation. The investors purchased the land at high prices primarily on the basis of these representations and not because they could or intended to occupy, utilize, or develop the land themselves. Under such circumstances, it is patent that what the investors were offered and what they purchased

[6] Even where the deeds did not employ this literal language, they did actually convey by other language "fractional undivided interests" in the mineral rights. See, e. g., Gov. Ex. 365, R. 2215–2216.

was not land *per se,* but an interest in a speculative promotion, the essence of which was the exploitation and development by others to the end of a mutual sharing by all investors in an undivided interest in oil royalties. In this connection, the decision of this Court in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.,* 320 U. S. 344, is apposite. In that case, certain promoters offered and sold to distant public investors instruments purporting to be assignments of leasehold interests in portions of a three-thousand acre tract of potential Texas oil and gas land, and they represented to investors that they would earn a profit because of drilling operations which were being carried on on the tract. Even though the instruments of assignment did not, as in the instant case, employ terminology unequivocally bringing them within the definition of securities in the Securities Act, this Court held that the defendants were selling "investment contracts" within that definition and stated that (320 U. S. at 348, 349, 352–353):

> Their proposition was to sell documents which offered the purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise. * * *
>
> * * * * *
>
> It is clear that an economic interest in this well-drilling undertaking was what brought into being the instruments that defendants were selling and gave to the

instruments most of their value and all of their lure. The trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end.

* * * * *

Nor can we agree with the court below that defendants' offerings were beyond the scope of the Act because they offered leases and assignments which under Texas law conveyed interests in real estate. In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be.

See also *Securities and Exchange Commission* v. *Howey,* decided May 27, 1946, No. 843, O. T. 1945; *Mansfield et al.* v. *United States,* 155 F. 2d 952 (C. C. A. 5); *United States* v. *Earnhardt,* 153 F. 2d 472 (C. C. A. 7), certiorari denied June 3, 1946, No. 1158, O. T. 1945.

7. The only remaining issue is the contention of petitioner Johnson that the trial court erred in not granting his motion for a directed verdict predicated on his claim that he had been improperly denied the right to a speedy trial pro-

vided by the Sixth Amendment (No. 486, Pet. 6, 16–21). It is true that almost eighteen months elapsed from the filing of the indictment (September 4, 1942) until commencement of the trial (February 28, 1944). However, it does not follow that this delay abridged the right to a speedy trial, because that right is necessarily relative and must be considered with regard to the practical administration of justice. *Beavers* v. *Haubert,* 198 U. S. 77, 86; see also *McDonald* v. *Hudspeth,* 113 F. 2d 984, 986 (C. C. A. 10), certiorari denied, 311 U. S. 683. Thus considered, there was no substantial infringement of Johnson's rights under the Sixth Amendment. The record shows that Johnson's arraignment was delayed until May 26, 1943, due to his efforts to negotiate a favorable sentence in the event he would plead guilty (R. 190–192, 201–202); that on September 28, 1942, he had been sentenced on another charge in the Southern District of Mississippi to three years' imprisonment in a federal penitentiary and was incarcerated during the interval between the indictment and trial here, but not on account of the instant prosecution (R. 190–192); that due to delay in apprehending one of the defendants (R. 192) and to the crowded calendar of the district court, the case could not be tried at an earlier date (R. 193); and that Johnson did not claim or show that his defense was impeded in any way by the delay or that witnesses on his behalf, if any, were no longer available (R. 192–193).

In the light of such circumstances, the delay in trying Johnson cannot be said to have been excessive or oppressive.

CONCLUSION

The decision below is correct, and the case involves no conflict of decisions. It is respectfully submitted that the petitioners for writs of certiorari should be denied.

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APPENDIX

Tables 1 and 2 below are based on an analysis of the record to show the interrelationships of the various petitioners in the many sales of the Plaquemines Parish land. Table 1 lists the names of the petitioners who dealt with each investor-witness, with supporting record references. Table 2 is a summary analysis of the references in Table 1 to show the actual interrelationships.

TABLE 1

[The order of petitioners' names following that of each investor-witness indicates the time sequence of dealings]

Investor	Salesman	Record Ref.
Langlois	Safir and Diaz	(R. 233-234.)
Allen	Kahn	(R. 331, 334-335.)
	Levy & Kahn	(R. 340-341.)
	Kahn and Baker	(R. 341-342.)
Carter	Silverman & Kiefer	(R. 356-357.)
	Silverman, Baker, Kahn & Kiefer.	(R. 374.)
Dupre	Safir	(R. 396-398.)
	Kahn	(R. 406-407.)
	Kahn & Levy	(R. 407-412.)
	Kahn & Levy	(R. 413-415.)
Kahlert	Levy	(R. 465-469.)
	Levy & Kahn	(R. 482-483.)
Koenig	Safir	(R. 532-534.)
	Burgin	(R. 536-537.)
	Safir	(R. 538.)
Lejeune	Kahn	(R. 553-555.)
	Johnson (alias Hunter)	(R. 557-558.)
	Kahn	(R. 563-564.)
	Diaz	(R. 558, 572.)
	Baker	(R. 567-569.)
	Kahn	(R. 565, 570-571.)
	Diaz	(R. 572.)
	Burgin (alias Bryce)	(R. 559.)
	Levy	(R. 573-574.)
	Safir	(R. 574.)
Bergerie	Safir	(R. 631-634.)
	Diaz	(R. 634-638.)
	Johnson	(R. 639-642.)
	Diaz	(R. 644-646.)

TABLE 1—Continued

Investor	Salesman	Record Ref.
Breisacher	Bird	(R. 682-683.)
	Safir	(R. 685-687.)
	Safir	(R. 689-691.)
	Silverman & Johnson (alias Hunter).	(R. 694-699.)
	Levy & Kahn	(R. 713.)
	Levy & Diaz	(R. 713-716.)
	Diaz & Overgaard	(R. 701-705.)
Clifton	Safir	(R. 787-789.)
	Diaz	(R. 791-792.)
Hershey	Kahn	(R. 805-806.)
	Levy	(R. 808-810.)
Daigre	Kahn & Levy	(R. 815-818.)
	Baker	(R. 819.)
	Levy	(R. 820.)
	Kahn & Levy	(R. 822-824.)
	Burgin (alias "Denny")	(R. 821-822.)
	Kahn & Levy	(R. 825-826.)
	Safir	(R. 828-829.)
Koch	Kahn & Levy	(R. 848-852.)
	Kahn & Levy	(R. 852-853.)
Duling	Silverman	(R. 892-894, 897-899, 937-940.)
	Diaz	(R. 905-906, 912.)
	Silverman	(R. 911, 920-922.)
	Johnson & Overgaard	(R. 921.)
	Safir	(R. 924-925.)
Monjure-Matthews	Safir	(R. 966-968.)
	Overgaard	(R. 968-970.)
	Johnson (alias Hunter)	(R. 967-971.)
	Silverman	(R. 974-977.)
	Johnson	(R. 974-975, 978-979.)
Rowe	Diaz	(R. 997-1001.)
	Diaz	(R. 1002-1004.)
	Diaz, Silverman & Kiefer	(R. 1004-1007.)
Harper	Kahn	(R. 1058-1062.)
	Kahn	(R. 1065-1066.)
	Kahn & Baker	(R. 1066-1069.)
	Overgaard	(R. 1070.)
	Diaz	(R. 1071.)
	Baker	(R. 1072-1073.)
Northrop	Manzella	(R. 1092-1093, 1098-1099.)
	Baker	(R. 1102.)
	Burgin (alias Bryce)	(R. 1097-1098.)
Borges	Kiefer	(R. 1104-1106.)
	Kiefer & Silverman	(R. 1107.)
	Silverman & Diaz	(R. 1109-1110.)
Rasmussen	Safir	(R. 1124-1128.)
	Safir & Kahn	(R. 1132-1133.)
	Levy	(R. 1135-1136.)
	Kahn	(R. 1136-1138.)
	Kahn	(R. 1140.)
Cuccia	Kahn & Manzella	(R. 1159-1161.)
	Levy	(R. 1163-1164.)
	Kahn	(R. 1164-1165.)

TABLE 1—Continued

Investor	Salesman	Record Ref.
Fowler-White	Kiefer & Silverman	(R. 1187–1195).
	Diaz & Overgaard	(R. 1220–1224.)
	Burgin (alias Bryce)	(R. 1234–1239, 1260.)
	Diaz & Baker	(R. 1239–1246, 1254, 1259, 1264–1265.)
	Burgin	(R. 1290).
	Kahn	(R. 1291–1294).
Coleman	Kiefer & Silverman	(R. 1422–1423.)
	Bird	(R. 1424.)
	Kiefer, Silverman & Manzella	(R. 1426–1432.)

TABLE 2

[The figure 1 indicates that the petitioners designated were involved in the same sale or sales; 2 indicates that petitioners dealt with the same investor or investors, though not in connection with the same sales; 3 indicates that petitioners accompanied each other when dealing with particular investors. There is no overlapping in the figures given, however, because, in each instance of contact with an investor, only that figure which most aptly describes the interrelationship between the two or more petitioners involved is used. Nor do the figures reflect the number of instances in which the particular relationship existed, although that factor is partially illustrated in Table 1.]

	Baker	Silverman	Kahn	Levy	Safir	Bird	Johnson	Burgin	Diaz
Baker	xxxxx	3	1, 2, 3	1, 2	2	-------	2	1, 2	1, 2, 3
Silverman	3	xxxxx	3	1	2	1, 2	1, 2, 3	2	1, 2, 3
Kahn	1, 2, 3	1, 2, 3	xxxxx	1, 2, 3	1, 2, 3	2	1, 2	1, 2	1, 2, 3
Levy	1, 2	1	1, 2, 3	xxxxx	2	2	1, 2	1, 2	1, 2
Safir	2	2	1, 2, 3	2	xxxxx	2	2	1, 2	1, 2, 3
Bird	-------	1, 2	2	2	2	xxxxx	2	2	2
Johnson	2	1, 2, 3	1, 2	1	2	2	xxxxx	2	1, 2
Burgin	2	2	1, 2	1, 2	1, 2	2	2	xxxxx	2
Diaz	2, 1	1, 2, 3	1, 2	1, 2, 3	1, 2, 3	2	1, 2	1, 2	xxxxx

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